ATTORNEY FOR APPELLANT:

P. STEPHEN MILLER
Fort Wayne, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

ELLEN H. MEILAENDER
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

EDWARD D. MILLER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	Nos. 02A04-0610-CR-548
	)	02A05-0610-CR-548
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Frances C. Gull, Judge
Cause Nos. 02D04-0601-FB-04 & 02D04-0601-FB-05

January 18, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Edward D. Miller appeals his aggregate sentence of seventy years for two counts of rape and a habitual offender enhancement.[1] We find that his sentence is not inappropriate and therefore affirm the trial court.

Facts and Procedural History

This is a consolidated appeal stemming from Cause No. 02A04-0610-CR-548 ("Cause No. 04") and Cause No. 02A05-0610-CR-548 ("Cause No. 05"). The facts pertaining to Cause No. 04 are as follows: On July 7, 2005, as E.S. was eating lunch in her parked car, Edward Miller entered her car in broad daylight and forced her to engage in sexual intercourse and to submit to oral sex against her will. The facts pertaining to Cause No. 05 are as follows: Around 11:00 a.m. on August 17, 2005, Miller entered the home of W.D. while she was in the shower, and he forced her to engage in sexual intercourse and to submit to oral sex against her will. Following investigations into both incidents, DNA evidence confirmed Miller as the perpetrator of both crimes to a reasonable degree of scientific certainty. Appellant's App., Cause No. 02A04-0610-CR-548 (Appellant's App. I) p. 69; Appellant's App., Cause No. 02A05-0610-CR-548 (Appellant's App. II) p. 67.

On January 11, 2006, Miller was charged in both cause numbers with Class B felony Rape,[2] Class B felony Criminal Deviate Conduct,[3] and with Habitual Offender

[1] Miller was sentenced for and appealed his sentences arising from two different cause numbers. Pursuant to a motion by the State submitted along with the filing of its appellee's briefs, the cases were consolidated in part and assigned to one panel for purposes of judicial efficiency. *See* Order, Nov. 8, 2006. Miller's arguments on appeal are identical in his briefs for each cause number. Accordingly, we address both cause numbers herein.

Enhancements.[4] On May 18, 2006, Miller entered into a plea agreement with the State. He agreed to plead guilty under Cause No. 04 to Class B felony Rape and under Cause No. 05 to Class B felony Rape and the Habitual Offender Enhancement. In exchange, the State agreed to dismiss the other charges. Sentencing was left to the trial court.

At the June 13, 2006, sentencing hearing, the trial court found the same aggravating and mitigating sentences with regard to both cause numbers. As aggravators, the trial court identified Miller's prior criminal history and cited the fact that past efforts at rehabilitation had failed. As mitigators, the court cited Miller's guilty plea, his acceptance of responsibility for the crimes, and his expression of remorse. The trial court then sentenced Miller to twenty years on the Class B felony in Cause No. 04 and to twenty years on the Class B felony and a thirty-year habitual offender enhancement in Cause No. 05; these sentences were ordered to run consecutively, resulting in an aggregate sentence of seventy years. Miller now appeals his sentence.

Discussion and Decision

On appeal, Miller raises two distinct arguments. First, he argues that the trial court should have sentenced him to less than the maximum sentence for each of the Class B felony convictions because it found mitigating circumstances. Second, he argues that his sentence is inappropriate in light of the nature of his offense and his character under Indiana Appellate Rule 7(B).

---

[2] Ind. Code § 35-42-4-1.

[3] Ind. Code § 35-42-4-2.

[4] Ind. Code § 35-50-2-8.

As an initial matter, we note that Miller was sentenced under Indiana's new advisory sentencing scheme, which went into effect on April 25, 2005, just a few months before Miller committed the present offenses. Under this scheme, "Indiana's appellate courts can no longer *reverse* a sentence because the trial court abused its discretion by improperly finding and weighing aggravating and mitigating circumstances[.]" *McMahon v. State*, 856 N.E.2d 743, 749 (Ind. Ct. App. 2006) (emphasis added). As such, appellate review of sentences in Indiana is now limited to Appellate Rule 7(B). *See id*. Nonetheless, an assessment of aggravating and mitigating circumstances is still relevant to our review for appropriateness under the rule, which states: "The Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." *Id*. at 748-49. We will therefore consider the aggravating and mitigating circumstances identified by the trial court in addressing Miller's argument that his sentence is inappropriate.

Miller first argues that the trial court erred by ordering the maximum sentence on each of his Class B felony rape convictions. Miller presents a novel interpretation of our new advisory sentencing scheme in support of this position.[5] He correctly points out that under the new scheme, a trial court may impose the maximum sentence for a given class

[5] Counsel for Miller also suggests a sweeping change in our interpretation of Indiana's sentencing statutes. He asserts that because the Class B felony statute indicates a sentencing range "*between* six (6) and twenty (20) years," the range is from seven to nineteen years. *See* Ind. Code § 35-50-2-5. He applies this interpretation likewise to other statutes providing sentencing ranges. *See* Ind. Code §§ 35-50-2-3 & -4, -6 & 7. While counsel's argument has some merit, grammatically speaking, it is not so persuasive as to lead us to disregard decades of sentencing, under both the presumptive and advisory sentencing statutes, that has nevertheless interpreted the high and low ends of sentencing ranges to be inclusive of the numbers provided in the statute. As the State points out, had our legislature disagreed with such an interpretation, it would have changed the statutes accordingly when it adopted the advisory scheme.

of felony on any defendant convicted of that class of felony. *See* Ind. Code § 35-38-1-7.1(d) ("A court may impose any sentence that is[] (1) authorized by statute[] and (2) permissible under the Constitution of the State of Indiana[,] regardless of the presence or absence of aggravating circumstances or mitigating circumstances.") However, he argues that under advisory sentencing, if a court finds *any* mitigating circumstances then the defendant is *per se* not "the worst of the worst." The following passage from Miller's brief sets forth his reasoning:

> Since every offender merit's [sic] the maximum sentence, aggravating circumstances are irrelevant in the determination of the presumptive or maximum sentence. In this sense the legislature has increased the sentence for every felony by its recent amendment, because it subjects every B felon to a term of 20 years. However, the advisory sentence then becomes the acceptable and desired sentence if there are any mitigating circumstances. At this stage the existence or non-existence of commonly termed aggravating factors is irrelevant as the Defendant is deemed subject to the maximum sentence, but one mitigating factor would demonstrate that he is not the worst of the worst, since the very worst would not have any mitigating factors. Furthermore, a trial court could sentence to less than the advisory sentence if the mitigating circumstances outweigh the particular [aggravating] circumstances in a given incident.

Appellant's Br. p. 9.

We simply cannot agree with Miller's interpretation of our advisory sentencing scheme. To say that a finding of any mitigator revokes the trial court's discretion to impose a maximum sentence directly ignores the language of the statute providing that a trial court may impose such a sentence "regardless of the presence or absence of aggravating or mitigating circumstances." Moreover, basing such an argument on the presence of any one mitigating circumstance as sufficient to remove a defendant from the "worst of the worst" category contradicts our oft-repeated recognition that one could

always envision a way in which the instant facts could be worse and thus the maximum sentence could never be justified. *See, e.g.*, *Wilkie v. State*, 813 N.E.2d 794, 804 (Ind. Ct. App. 2004), *trans. denied*. The trial court did not err when it sentenced Miller to the maximum sentence despite the presence of mitigating circumstances.

Miller next argues that the trial court failed to assign sufficient mitigating weight to his guilty plea, his acceptance of responsibility for his crimes, and his expression of remorse. As for Miller's guilty plea, the significance of a guilty plea as a mitigating factor varies from case to case. *Francis v. State*, 817 N.E.2d 235, 238 n.3 (Ind. 2004). Here, the record indicates that prosecutors planned to present DNA evidence confirming Miller as the rapist of both E.S. and W.D. A guilty plea does not rise to the level of significant mitigation where the evidence against the defendant is such that the decision to plead guilty is merely a pragmatic one. *Wells v. State*, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005), *trans. denied*. Given the strength of the evidence against Miller, the trial court was not required to assign greater mitigating weight to his guilty plea.

As for Miller's acceptance of responsibility and expression of remorse at the sentencing hearing, Miller does not explain why he believes that the trial court should have given these greater mitigating weight. Furthermore, the trial court is not required to give the same weight to a mitigator as the defendant does and is not obligated to explain why it did not find a factor to be significantly mitigating. *Cuyler v. State*, 798 N.E.2d 243, 246 (Ind. Ct. App. 2003), *trans. denied*. The trial court committed no error, then, by its handling of these mitigators.

Miller also contends that he "was sentenced to the maximum of 30 years for the habitual enhancement . . . even though the underlying felonies for the habitual were Class D felonies, and even after he had been informed that the 'presumptive sentence' for the habitual was ten years." Appellant's Br. p. 12. Miller cites to no authority and makes no further argument on the point, and it is therefore waived. Ind. Appellate Rule 46(A)(8)(a). Waiver notwithstanding, we direct Miller to Indiana Code § 35-50-2-8(h), which provides: "The court shall sentence a person found to be a habitual offender to an additional fixed term that is not less than the advisory sentence for the underlying offense nor more than three (3) times the advisory sentence for the underlying offense. However, the additional sentence may not exceed thirty (30) years." The basis for determining the length of a habitual offender enhancement, then, is the underlying felony, not the prior felonies supporting the enhancement. Miller's underlying rape conviction is a Class B felony, the advisory sentence for which is ten years. Ind. Code § 35-50-2-5. Therefore, a thirty-year enhancement is within the permissible range available to the trial court.

In addition to the above considerations, Miller contends that his sentence is inappropriate in light of the nature of his offenses and his character. In particular, Miller stresses:

> Many defendants have worst [sic] records, including habituals based on C and B felonies. . . . [He] committed two horrible crimes, but he was not punished for one and subsequently commit [sic] another. He committed two rapes without government correction, and ultimately accepted responsibility for the same. He was a habitual because of two D felonies—it is difficult to see how he merit's [sic] a maximum sentence on such grounds.

Appellant's Br. p. 12. Nevertheless, the nature of Miller's offenses and his character support a maximum sentence. He raped two women, both of whom were strangers to him and both in broad daylight. Miller's prior criminal history consists of three felony convictions and eight misdemeanors in addition to the instant offenses. All three of his felony convictions were for violent crimes, with one for battery and two for domestic battery. His misdemeanor convictions also include two counts of domestic battery, and he has a probation revocation to his credit. He testified that he raped these women because he was frustrated that he had been unable to reconcile with his estranged wife and because he was unemployed. Given the nature of these offenses and Miller's character, we cannot say that his seventy-year sentence is inappropriate.

Affirmed.

BARNES, J., concurs.

BAILEY, J., concurs in result.